

UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

September 29, 2020 at 1:30 p.m.

1.	<u>19-27269</u>-A-7	MARIA ESPITIA RAMIREZ Gabriel Liberman	STATUS CONFERENCE RE: MOTION FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY , MOTION TO RECONSIDER 6-17-20 <u>[32]</u>
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CLOSED: 07/31/2020

Debtor's Atty: Gabriel Liberman

Notes:

Set by order of the court filed 8/31/20 [Dckt 38]. Debtor and Debtor's counsel to appear. Status reports to be filed and served on or before 9/22/20.

Status Report [Daniel L. Clinciu] filed 9/21/20 [Dckt 40]

[PLC-1] Motion to Seek Relief from the Order [Daniel L. Clinciu] filed 9/21/20 [Dckt 41]; supporting letter filed 9/21/20 [Dckt 42]

Status Report Re: Motion to Set Aside Order by Daniel Livis Clinciu filed 9/21/20 [Dckt 43]

The Status Conference is XXXXX.

The Court has scheduled a Status Conference in this Contested Matter commenced by Debtor Maria Ramirez seeking damages for alleged violations of the Automatic Stay by Daniel L. Clinciu. Order, Dckt. 41. On June 17, 2020, this court entered an order imposing the award of damages pursuant to 11 U.S.C. § 362(k) to be paid by Daniel L. Clinciu for violations of the Automatic Stay. Order, Dckt. 32.

The Status Conference was ordered in light of Mr. Clinciu having sent a letter to the court requesting relief from the order imposing sanctions. The Status Conference Order includes a discussion of the Federal Rules of Civil Procedure and Federal Rules of Bankruptcy Procedure and the need to properly request relief from the court by motion, application or complaint, not letter request. The Court's Status Conference order also requires the filing of Status Conference Reports by both Mr.

Cliniciu and the Debtor.

Review of Mr. Cliniciu's Motion and Status Report

On September 21, 2020, Mr. Cliniciu filed his responsive pleading, which is titled "Motion to Seek Relief From the Order" (Dckt. 41). Mr. Cliniciu also filed a Status Report (Dckt. 40). The Motion to Seek Relief has not been set for hearing, is not supported by evidence, and does not provide the court with the legal basis upon which the relief may be granted.

Review of Motion

The "Motion" does include information that would be included in a status report by Mr. Cliniciu. He discusses having notified the Sheriff's Department on December 18, 2019 (having been notified of the bankruptcy filing on December 17, 2019) to stop the wage garnishment. Then, on February 13, 2020, commenced an adversary proceeding to have the obligation owing on the state court judgment (upon which the garnishment was based) determined nondischargeable in Debtor's bankruptcy case.

Mr. Cliniciu then discusses settlement discussions initiated by the Debtor, and then "settlement negotiations" between Debtor's boyfriend/partner and Mr. Cliniciu (Mr. Cliniciu stating that due to the instructions of Debtor's then counsel to not communicate directly with the Debtor, he communicated with the Debtor's boyfriend/partner who is also a judgment debtor on the same state court judgment).

Mr. Cliniciu states that a settlement was reached with the Debtor and boyfriend/partner, and he dropped the adversary proceeding.

Mr. Cliniciu states that on April 10, 2020, he sent emails to both the boyfriend/partner and Debtor's attorney confirming that the Sheriff did not garnish any of Debtor's wages. He states that no responses to his emails were sent by the boyfriend/partner or Debtor's counsel.

Mr. Cliniciu states that he was not aware of the June 11, 2020 hearing. He makes reference to *ex parte* pleadings having a 2017 hearing date that were emailed to him by Debtor's current counsel. (Those are filed under Docket Control No. PLC-2, which were not set for hearing, certificate of service filed stating service by email on Mr. Cliniciu, the U.S. Trustee, and Mr. Richards, and no order entered thereon. Dckts. 22, 24, 25.)

Review of Status Report

In his Status Report, Dckt. 40, Mr. Cliniciu repeats having learned of the bankruptcy filing on December 17, 2019, and notifying by phone the Sheriff on December 18, 2019, to cease the wage garnishment. As stated in the Motion:

The court should note that I have been living in Taiwan prior to this issue arising, where I'm currently a doctorate student and an assistant professor. Moreover, a letter displaying the time and date of the hearing that took place on June 11, 2020 was never received at 1525 Deer Hollow Way, my USA address. My brother checks the mail regularly (I am using his mailing address since I do not reside in

the USA) but did not find any letters from the court or the other party with the actual hearing time and date. I have carefully gone through all the letters and emails received pertaining to Case No. 19-27269-A-7, the Order (Dckt. 35) and could not find any.

While stated in the Status Report, no testimony (as provided in the Federal Rules of Evidence) is provided by Mr. Clinciu.

Second Status Report by Daniel Clinciu

On September 24, 2020, Mr. Clinciu filed a second Status Report. Dckt. 46. This letter repeats, and reargues, why the Order for Sanctions should be set aside.

In the second Status Report Mr. Clinciu states that:

12. On April 3, 2020 the sheriff's office was called again and a written letter was also filed which confirmed that no garnishment will occur to the debtor's wages even though the garnishment letter went out.

Second Status Report, ¶ 12; Dckt. 46. It is not clear what letter this is, whether sent by the Sheriff, and what was communicated to the Debtor.

Status Report by Debtor

On September 21, 2020, Debtor filed her Status Report. Dckt. 43. Debtor begins by confirming that the Motion for Sanctions was served on Mr. Clinciu at the property located in Roseville, California. This is consistent with the Certificate of Service, which also includes an email address. Dckts. 21, 27, 29.

In the Status Report, Debtor states that Mr. Clinciu "admits" taking no action other than calling the Sheriff to stop the garnishment.

The Status Report asserts that a motion in September 2020 is "Untimely" and should not be allowed to vacate an order entered in June 2020.

With respect to service of the Motion for Sanctions, it was served at the address that Mr. Clinciu used in his August 21, 2020 letter (Dckt. 35) requesting relief from the Order for Sanctions. Mr. Clinciu provides no address on this Status Report or the Motion to Seek Relief (Dckts. 40, 41).

Motion For Sanctions and Motion to Seek Relief "Facts"

In the Motion for Sanctions for Violation of the Automatic Stay, it is alleged that Mr. Clinciu obtained a judgment in the amount of \$4,936.31 on September 6, 2019. This bankruptcy case was filed on November 22, 2019. On February 24, 2020, Debtor received a discharge.

It is alleged that on March 26, 2020, Mr. Clinciu "caused a Wage Garnishment to be served

through the Sacramento County Sheriff on or about March 17, 2020 (Exhibit 1).” Motion, ¶ 14; Dckt. 16. Exhibit 1 (Dckt. 18) filed in support of the Motion for Sanctions is an Earnings Withholding Order that is dated March 17, 2020, and signed by the Sacramento County Sheriff’s agent.

In his Motion to Seek Relief, Mr. Clinciu states that he learned of Debtor’s bankruptcy case on December 17, 2019, and on December 18, 2019, asked the Sacramento County Sheriff’s Office “for the garnishment to be removed.” Motion to Seek Relief, ¶ 2,3; Dckt. 41. While indicating that the garnishment was stopped in December 2019, no explanation is advanced as to why in March 2020 the Sheriff began to enforce an earnings withholding order.

Attached to Mr. Clinciu’s letter filed with the court on August 21, 2020 (Dckt. 25) is an email thread which Mr. Clinciu directs the court to read concerning his communications with counsel for Debtor. This thread includes:

A. April 6, 2020 Email From Debtor’s Counsel to Mr. Clinciu:

1. Demanding that wage garnishment be stopped.
2. Stating that having Mr. Clinciu’s brother call the Sheriff is not sufficient, but that the garnishment must be withdrawn from the Sheriff.

No information is provided as to why Debtor’s Counsel sent the April 6, 2020 email. This is four days after the Motion for Sanctions was filed.

B. April 8, 2020 Response from Mr. Clinciu to Debtor’s Counsel:

1. Stating that Debtor damaged Mr. Clinciu’s property.
2. The garnishment was filed long before the Chapter 7 case was filed.
3. Mr. Clinciu wants to work this out.
4. Mr. Clinciu will notify Debtor’s Counsel when the Sheriff “removes the garnishment.”

C. April 11, 2020 Email from Mr. Clinciu to Debtor’s Counsel:

1. States that Sheriff’s Office confirmed that as of April 10, 2020, the garnishment was stopped and “no money or any amount of [Debtor’s] salary was released.”

D. August 16, 2020 Email From Mr. Clinciu to Debtor’s Counsel:

1. Mr. Clinciu received notice of the judgment lien for the order imposing sanctions for violation of the Automatic Stay.
2. Mr. Clinciu requests information as to why the lien was recorded.

- E. August 17, 2020 Reply from Debtor's Counsel's Office to Mr. Clinciu:
 - 1. Transmits a copy of the court's June 17, 2020 Order for Sanctions.
- F. August 18, 2020 Response from Mr. Clinciu to Debtor's Counsel:
 - 1. States that the Sheriff never enforced a wage garnishment.
 - 2. Mr. Clinciu did not receive notice of a hearing.
 - 3. If Mr. Clinciu had received a notice, he would have appeared.

Retention of Counsel by Mr. Clinciu

In another letter written to the court dated September 17, 2020 (filed September 21, 2020; Dckt. 42), Mr. Clinciu states that he has been "desperately looking for some counsel and have not been able to find any lawyers to take my case." He further states that the third floor counseling services at the Courthouse (*pro se* informational services, not legal representation) cannot be accessed due to the Courthouse being closed to the public. Mr. Clinciu states that since he lives in Taiwan he would have friends go in to seek such informational services for him. Additionally, he has tried to connect with clinics at McGeorge and UC Davis, but has been turned down.

At this juncture, the court notes that the time for informational counseling has long passed. Mr. Clinciu needs to obtain counsel. To date, he has not, and is not, effectively prosecuting any defense nor prosecuting a motion to vacate the Order imposing sanctions. No legal authorities have been presented, nor any admissible, properly authenticated evidence.

There is no basis shown why Mr. Clinciu cannot employ counsel. He is waist deep in this litigation and legally floundering.

It may be that "it's not worth paying an attorney" for a small claims judgment of \$4,936.31. That is an economic decision to make. However, federal court is not "small claims court" and the parties have to prosecute their claims and requests for relief as permitted by law and the Federal Rules of Civil Procedure and Bankruptcy Procedure. It is not an "informal setting" in which arguments are thrown to a mediator/arbitrator who then prosecutes the case for each side and then makes a "wise decision."

There is a \$4,936.31 pre-petition state court judgment that has been discharged – the adversary proceeding to have it determined nondischargeable having been dismissed without prejudice due to Mr. Clinciu not paying the filing fee and Mr. Clinciu affirmatively stating that he would not pursue it in light of the co-judgment debtor, Debtor's roommate/partner, having agreed to satisfy the judgment. 20-2015; Order and Mr. Clinciu's letter, Dckts. 24, 23. Presumably Mr. Clinciu is continuing to enforce that judgment against the Debtor's roommate/partner.

There is the Order for Sanctions in the amount of \$5,575.00 which has been granted Debtor. Relief was sought for violation of the Automatic Stay and the Discharge Injunction. The damages are comprised of \$1,000.00 in emotional distress damages, \$2,800.00 in attorney's fees, \$25.00 in actual damages, and \$1,750.00 in punitive damages. Order; Dckt 32. The attorney's fees were awarded

pursuant to 11 U.S.C. § 362(k). The Motion for Sanctions clearly states that the Debtor's discharge was entered on February 24, 2020, and that the alleged improper conduct occurred post-discharge on or after March 17, 2020, at which time the automatic stay would have terminated as to the Debtor. 11 U.S.C. § 362(c)(2)(C).

STATUS CONFERENCE

The court first notes that Mr. Clinciu appears to continue to believe that there is a motion seeking relief from the court's Sanction Order. He has not set a hearing on such a motion, there is no testimony presented to support alleged facts and to authenticate any exhibits. Mr. Clinciu is continuing down the path of just writing to the court to argue why things should be different. Though continuing to struggle, Mr. Clinciu has not obtained counsel.

At the Status Conference **XXXXXXXXXX**

NATIONSTAR MORTGAGE LLC VS.

Local Rule 9014-1(f)(1) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtor’s Attorney, Chapter 13 Trustee, and Office of the United States Trustee on July 2, 2020. By the court’s calculation, 40 days’ notice was provided. 28 days’ notice is required.

The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party’s failure to file opposition as consent to grant a motion). The defaults of the non-responding parties and other parties in interest are entered.

The Motion for Relief from the Automatic Stay is XXXXX.

Nationstar Mortgage LLC dba Mr. Cooper (“Movant”) seeks relief from the automatic stay with respect to Samuel Middlebrook See and Christina D. See’s (“Debtors”) real property commonly known as 7558 Eastgate Avenue, Citrus Heights, California (“Property”). Movant has provided the Declaration of Chastity Wilson to introduce evidence to authenticate the documents upon which it bases the claim and the obligation secured by the Property.

Movant argues Debtor has not made three (3) post-petition payments, with a total of \$4,752.78 in post-petition payments past due. Declaration, Dckt. 35.

CHAPTER 13 TRUSTEE’S RESPONSE

David P. Cusick (“the Chapter 13 Trustee”) filed an Opposition on July 23, 2020. Dckt. 44. Trustee asserts that Debtor is delinquent \$183.46, where Debtor has paid to date a total of \$5,295.46. *Id.*, at p. 1. Trustee has disbursed a total of \$1,494.01 to Movant. *Id.*, at p. 2. Trustee notes that Movant filed a Proof of Claim on March 29, 2020 for \$262,549.30, which indicates the amount necessary to cure any default as of the date of the petition is \$26,633.95. *Id.* Trustee has disbursed \$0.00 toward pre-petition arrearage. *Id.*

DEBTOR’S RESPONSE

Debtor filed a Reply on July 23, 2020. Dckt. 53. Debtor asserts that Debtors filed, set, and served a Motion to Confirm Debtors’ First Amended Chapter 13 Plan on July 27, 2020 that addresses Creditor’s assertions in this matter.

A review of the docket shows that Debtor filed a First Amended Plan and a Motion to Confirm on July 27, 2020, which has been set for hearing at 2:00 p.m. on September 1, 2020. Dckt. 47.

DISCUSSION

From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$268,693.04 (Declaration, Dckt. 35), while the value of the Property is determined to be \$380,000.00, as stated in Schedules A/B and D filed by Debtor.

11 U.S.C. § 362(d)(1)

Whether there is cause under 11 U.S.C. § 362(d)(1) to grant relief from the automatic stay is a matter within the discretion of a bankruptcy court and is decided on a case-by-case basis. *See J E Livestock, Inc. v. Wells Fargo Bank, N.A. (In re J E Livestock, Inc.)*, 375 B.R. 892 (B.A.P. 10th Cir. 2007) (quoting *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003)) (explaining that granting relief is determined on a case-by-case basis because “cause” is not further defined in the Bankruptcy Code); *In re Silverling*, 179 B.R. 909 (Bankr. E.D. Cal. 1995), *aff’d sub nom. Silverling v. United States (In re Silverling)*, No. CIV. S-95-470 WBS, 1996 U.S. Dist. LEXIS 4332 (E.D. Cal. 1996). While granting relief for cause includes a lack of adequate protection, there are other grounds. *See In re J E Livestock, Inc.*, 375 B.R. at 897 (quoting *In re Busch*, 294 B.R. at 140). The court maintains the right to grant relief from stay for cause when a debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *W. Equities, Inc. v. Harlan (In re Harlan)*, 783 F.2d 839 (9th Cir. 1986); *Ellis v. Parr (In re Ellis)*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Here, Debtor has set for hearing a Motion to Confirm a Chapter 13 Plan that provides for Creditor’s claim, both current monthly payments and curing the arrearage. Dckt. 51. Additionally, Movant has a 41% equity cushion protecting its ability to be paid on its claim, including costs and interest.

11 U.S.C. § 362(d)(2)

A debtor has no equity in property when the liens against the property exceed the property’s value. *Stewart v. Gurley*, 745 F.2d 1194, 1195 (9th Cir. 1984). Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor or estate has no equity in property, it is the burden of the debtor or trustee to establish that the collateral at issue is necessary to an effective rehabilitation. 11 U.S.C. § 362(g)(2); *United Sav. Ass’n of Texas v. Timbers of Inwood Forest Assocs. Ltd.*, 484 U.S. 365, 375–76 (1988); 3 COLLIER ON BANKRUPTCY ¶ 362.07[4][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.) (stating that Chapter 13 debtors are rehabilitated, not reorganized).

Based on the Schedules A/B and D, there is a modest equity in the Property above the two claims secured by the Property. No contrary evidence of value has been provided by Movant.

Movant’s analysis of their being no equity is based on the immediate liquidation of the Property and deducting out 8% for a seller’s costs of sale. However, the Plan does not provide for such liquidation, but for the Debtor to retain the Property, with a \$30,000 equity.

CONTINUANCE

The Debtor is prosecuting a plan in this case, with the confirmation hearing being several weeks away. Movant is adequately protected and there is equity (and a large equity cushion for Movant).

While the court could deny the Motion, since a large part of whether relief should be granted turns on Debtor being able to confirm the Plan on September 1, 2020, the court continues the hearing so that Movant will not have to go to the cost and expense of a new motion.

The continuance, rather than denial without prejudice, requires the consent of the Movant. At the hearing, Movant consented to the continuance of the hearing.

SUPPLEMENTAL REPLY

On August 25, 2020, Debtors filed a Supplemental Reply stating that due to a calculation error, Debtor's First Amended Chapter 13 Plan was not feasible as proposed and request a continuance so that Debtors may file, set, serve, and be current under a further amended plan. Dckt. 63.

CONTINUANCE OF THE SEPTEMBER 1, 2020 HEARING

The Debtor has been unable to confirm the proposed plan. At the hearing on this Motion, Debtor's counsel represented that Debtor's would proceed with an immediate sale of the Property to salvage Debtor's substantial exemption value in the Property.

The court further continued the hearing conditioned on an adequate protection payment being disbursed by the Chapter 13 Trustee and Debtor obtaining the authorization to, and actually employing a real estate broker for the marketing and sale of the Property.

MOVANT'S SEPTEMBER 22, 2020 REPLY

Movant filed a Reply on September 22, 2020. Dckt. 69. Movant informs the court that Trustee has disbursed the adequate protection payment of \$1,415.89. But points the court to Debtor's lack of an *Ex-Parte* Motion for Employment of a real estate broker for the sale of the Property. Movant renews its request that Court terminate the automatic stay.

SEPTEMBER 29, 2020 HEARING

As of the court's review of the docket for this matter, Debtor has failed to file an *Ex-Parte* Motion to Employ a Realtor. Movant asserts that this demonstrates Debtor's failure to diligently prosecute a sale of the Property as represented to the court would be done.

At the hearing, **xxxxxx**